Supreme Court, U.S.
FILED
MAR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

89- 1508

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether orders of a federal administrative agency that are silent on preemption can be held by inference to oust a state's traditional authority to remedy a breach of the contractual duty of good faith and fair dealing on the grounds that agency orders must have "room to breathe."

2. Whether a jury verdict that defendant attempted to monopolize, based on proof that defendant through predatory conduct excluded its lower-priced competitor and then charged supra-competitive prices, can properly be overturned on appeal solely because:

   a. A 54% market share, though achieved through predation and resulting in supra-competitive prices, is not in the court's estimation close enough to monopoly to support a verdict of attempted monopolization; and

   b. The monopoly power and supra-competitive profits achieved by predation would not last for more than six years.

PARTIES

The parties to the proceeding below were: Colorado Interstate Gas Company, Natural Gas Pipe Line Company of America, and NGPL-Trailblazer, Inc. A list of the parent company, subsidiaries and affiliates of the petitioner previously has been filed with this Court as Appendix A of Petitioner's Application for an Extension of Time within which to File Petition for a Writ of Certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 885 F.2d 683, and is included in the Appendix at pp. 1a-28a. The order of the court of appeals denying rehearing is included in the Appendix at pp. 87a-88a. The opinion of the district court denying respondents' motion for judgment notwithstanding the verdict and for a new trial is reported at 661 F. Supp. 1448, and is included in the Appendix at pp. 29a-86a. In addition, for the convenience of the Court, four opinions of the Federal Energy Regulatory Commission germane to the first question presented are also reproduced in the Appendix at pp. 1b-74b.

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 11, 1989. A timely petition for rehearing was denied on December 12, 1989. An extension of time within which to file a petition for writ of certiorari was granted by this Court on February 28, 1990, extending the time for filing this petition until March 26, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States, states in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI.

Section 2 of the Sherman Act provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

Section 4 of the Clayton Act provides in pertinent part: "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

STATEMENT OF THE CASE

Petitioner, Colorado Interstate Gas Company ("CIG") brought this case against respondents, Natural Gas Pipeline Company of America ("NGPL") and NGPL-Trailblazer, Inc., alleging that NGPL had attempted to monop-

olize the market for long-distance transportation of Wyoming gas in violation of Section 2 of the Sherman Act. CIG also asserted that NGPL breached its contract with CIG, breached its duty to perform that contract in good faith, and tortiously interfered with contractual relations. A jury returned a verdict for CIG on all counts, and the district court sustained the verdict against respondents' motion for judgment NOV.

The court of appeals affirmed the tortious-interference verdict, but reversed the remaining claims. The court held that a series of Federal Energy Regulatory Commission ("FERC") rulings expressly preempted CIG's simple breach of contract claim, a ruling not challenged in this petition. It also held, however, that CIG's separate claim that NGPL breached its duty to perform in good faith was preempted (and indeed that all "actions based upon breach of contract" were preempted), *even though FERC had never addressed such claims*, on the theory that FERC orders "must have room to breathe." App. 11a-14a & n.9. Furthermore, although the court of appeals agreed with the jury and district court that NGPL had engaged in blatently "predatory conduct" that had excluded a low-cost competitor and had enabled NGPL to expand market share to 54% while charging "supracompetitive prices" (*id.* at 27a), it reversed the Section 2 verdict because it believed it unlikely that respondents' Trailblazer System would ever achieve a 70%-80% market share or that NGPL would be able to charge supracompetitive prices for more than six years.

The Tenth Circuit's preemption and antitrust rulings create and exacerbate conflicts with other circuit courts on recurring and fundamental legal issues. The Fifth Circuit has expressly refused to preempt breach of good faith duty claims (let alone all contract remedies) simply because some contract claims are preempted by FERC rate-setting. Moreover, several circuits have held that proof of unambiguously predatory conduct that allows a

predator to capture half of the market and charge supra-competitive prices is sufficient to support a Section 2 verdict, and petitioner is aware of no other court that has ever excused such conduct on the ground that its patently anticompetitive market effects would last only six years. Both rulings warrant this Court's review.

A. Factual Background

1. *The parties.* CIG is a pipeline company that buys, transports, and sells natural gas. CIG's pipeline begins in southwest Wyoming, runs east to Cheyenne, then turns south through Colorado and continues into the Oklahoma and Texas panhandles. At that point, CIG's pipeline connects with other major "trunk" lines that can carry the gas to the Midwest and elsewhere. (A map showing the principal pipelines involved is provided for the Court's convenience at App. 75b.)

NGPL is also a pipeline company. It owns one of the pipelines that intersects with CIG's in Oklahoma, runs northeast from Oklahoma through Beatrice, Nebraska, and terminates in Chicago, Illinois, where NGPL sells natural gas to consumers. For many years, NGPL has purchased gas from CIG that CIG had transported to Oklahoma from points north and west and delivered there to NGPL. NGPL also has the largest interest in a relatively new pipeline, called the Trailblazer System, that transports gas from southwest Wyoming to the midwest. NGPL-Trailblazer, Inc., a wholly owned subsidiary of NGPL, together with two partners, owns one of three segments of the Trailblazer System.

2. *The Service Agreement.* In 1982, CIG and NGPL entered into a seven-year Service Agreement that required CIG to deliver and NGPL to purchase substantial volumes of natural gas. The contract included two different rates for gas, a higher rate ("H-1") for gas delivered to NGPL from CIG's pipeline system, and a lower rate ("F-1") for gas delivered from the field. App. 3a.

The Service Agreement contained both a "minimum take" and a "minimum bill" provision (Sections 2 and 4, respectively). The minimum take provision required NGPL to purchase and take delivery of a specified volume of gas on a daily basis. The minimum bill provision required NGPL to pay CIG for at least 90% of the specified total annual volume of gas, regardless of how much gas was actually taken, to be calculated at the F-1 rate. App. 5a-6a.

3. *FERC's Regulatory Actions.* Under the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§ 717-717w, and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3319, FERC has extensive authority to review, approve, and modify contracts for the sale and transportation of natural gas. In the early 1980's, FERC issued a series of orders applicable generally to pipeline contracts containing minimum take and minimum bill provisions.[1] These orders allowed pipelines to recover only their fixed costs (and not their variable costs) from buyers that fail to purchase their minimum volume and thus incur liability under minimum take or minimum bill provisions. These orders, however, do not release pipelines from their obligation under the NGA to stand ready to deliver the full volume of gas specified in the contract.

FERC issued these orders in response to what it termed "dramatic changes" in the market for natural gas. Order No. 380, 49 Fed. Reg. at 22,781. By the early 1980's, the natural gas shortage of the 1970's had ended and was replaced by a gas glut. In this environment, minimum bill provisions, if fully enforced, served to discourage

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[1] See Order No. 380, 49 Fed. Reg. 22,778 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,571 (June 1, 1984) (codified at 18 C.F.R. § 154.111); Order No. 380-A, 49 Fed. Reg. 31,259 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,584 (Aug. 6, 1984) (codified at 18 C.F.R. § 154); Order No. 380-C, 49 Fed. Reg. 43,625 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,607 (Oct. 30, 1984) (codified at 18 C.F.R. § 154); Order No. 380-D, 49 Fed. Reg. 50,634 (1984), FERC (CCH) ¶ 61,332 (Dec. 21, 1984) (codified at 18 C.F.R. § 154).

buyers from seeking out cheaper sources of gas. *Id.* By limiting the buyer's exposure under such provisions to reimbursement of the pipeline's fixed costs, FERC intended to foster competition by encouraging buyers to seek out the lowest prices for gas. *Id.*

In a separate series of orders, FERC reviewed the Service Agreement at issue here and specifically addressed the question of how to calculate the minimum bill in the event NGPL failed to meet its purchase obligations.[2] FERC ruled that, under the minimum bill provision of the Service Agreement and in light of Order No. 380, CIG was entitled to recover only its fixed costs for gas not purchased, and that these costs were to be calculated at the F-1 rate. App. 7a. At no point, however, did FERC address the question of how to calculate damages if NGPL refused to purchase CIG's gas in bad faith and as part of a plan to destroy competition and raise transportation prices. *Id.* at 11a n.9, 12a.

4. *The Trailblazer System.* The gas shortage of the 1970's led to the discovery of substantial gas reserves in southwest Wyoming. Anxious to secure access to these reserves, NGPL became the principal proponent of and eventually held the chief financial interest in a new pipeline to transport natural gas out of southwest Wyoming. Known as the Trailblazer System, this pipeline runs parallel to CIG's pipeline as far as Cheyenne, but then continues east to Beatrice, Nebraska, where it intersects the NGPL line. It thus provides an alternative to CIG's pipeline for moving Wyoming natural gas to the midwest. *Id.* at 31a; see App. 75b (map).

Although FERC approved the pipeline in 1978, it was not confident that there would be an adequate need for additional pipeline capacity. FERC therefore imposed an unusual rate structure in which revenues would increase

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[2] See *Colorado Interstate Gas Co.*, 25 FERC (CCH) ¶ 63,012 (Oct. 18, 1983); 27 FERC (CCH) ¶ 61,315 (May 25, 1984); 28 FERC (CCH) ¶ 61,083 (July 23, 1984); 29 FERC (CCH) ¶ 61,124 (Oct. 31, 1984); 31 FERC (CCH) ¶ 61,325 (June 19, 1985).

sharply, but only as the amount of gas flowing through the system (or "throughput") increased, thereby placing on the pipeline owners the risk that demand projections would not be met. The Trailblazer System cost $500 million to build, 70 percent of which was financed through debt. The debt was guaranteed by long term contracts allocating the pipeline's capacity for the useful life of the pipeline. NGPL assumed the lion's share of this debt, roughly 50 percent, and consequently received control over roughly 50 percent of the capacity of the system.[3] *Id.* at 51a.

The Trailblazer System began transporting gas in late 1982. NGPL soon found that throughput and consequently revenues were far less than had been projected. There was little prospect for increasing the flow of gas in the system because consumption patterns made an increase in demand for gas unlikely. Indeed, NGPL saw that under ordinary competitive conditions the Trailblazer System could not draw business away from other pipelines because, as a new pipeline built at high cost, it was forced to charge significantly higher transportation rates than those of established, fully amortized pipelines, including CIG's line. App. 75b. NGPL's anticompetitive response to this economic predicament formed the basis for this lawsuit.

5. *Monopolistic and "reprehensible" conduct and market effects.* NGPL responded to this predicament with "reprehensible conduct" (App. 19a) that lacked any legitimate business justification: It manipulated its gas purchases so as to exclude CIG from the market for transporting natural gas, leaving Wyoming producers no

[3] NGPL's substantial capacity control gave it the chief interest in the Trailblazer System. Although CIG owned one of the three segments of the Trailblazer System, App. 17a n.14, it assumed a much smaller percentage of the debt and therefore controlled far less of the System's capacity than did NGPL. CIG had no control over any pipeline capacity east of Cheyenne, and no control whatsoever over NGPL's use of its capacity, even on the segment owned by CIG.

choice but to use the higher-priced Trailblazer System. *Id.* at 38a-40a, 57a-58a. Beginning in July 1983, NGPL refused to purchase and accept delivery of gas from CIG. This refusal had the effect of tying up roughly half of CIG's long-distance transportation capacity because both the Service Agreement and the NGA required CIG to reserve this capacity for NGPL in the event NGPL resumed purchases. *Id.* at 23a. NGPL then took additional steps to further its scheme to exclude CIG from the market. First, NGPL deliberately interrupted CIG's attempts to provide transportation for new customers by making strategically timed demands for gas from CIG. *Id.* at 19a, 38a-39a. Second, NGPL refused to take advantage of CIG's offer to "renominate" a lower minimum purchase requirement.[4] In the normal course of business, a buyer incurring F-1 fixed costs for gas not taken would leap at the chance to decrease or eliminate those costs; NGPL, however, "chose to nominate the same volumes," which perpetuated the tie-up and thus "prevent[ed] CIG from offering a low-cost transportation alternative." *Id.* at 58a, 18a-19a. Finally, by immediately and permanently replacing CIG's gas with gas that was *more expensive*, NGPL demonstrated that its purpose in refusing to purchase CIG's gas was not to switch to a lower-priced source of gas (in accordance with the policy of Order No. 380). *Id.* at 56a. Instead, NGPL's purposes were to eliminate a lower-cost competitor and force suppliers to pay the Trailblazer System's supracompetitive prices. *Id.* at 54a-58a.

NGPL's predatory conduct forced CIG to relinquish its rights to purchase gas from several suppliers, including its largest, Champlin Petroleum, which then had to use the higher-priced Trailblazer System. *Id.* at 62a. Other suppliers that attempted to use CIG's pipeline had

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[4] Under CIG's FERC-approved tariff, any customer could renominate a lower minimum purchase volume, but only if another customer were willing to purchase the difference. In this instance, CIG waived this provision in order to facilitate renomination.

their service interrupted by NGPL's strategically timed purchase demands, which forced them to use the higher-priced Trailblazer System. *Id.* at 39a. By the time the filing of CIG's lawsuit halted NGPL's gas acquisition tactics, NGPL had managed to increase Trailblazer's share of the market for long-distance transportation of Wyoming gas from 41% to 54%, while CIG's fell from 23% to 10%. *Id.* at 52a. More important still, NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas" (*id.* at 39a), because the other Wyoming pipelines were tied-up (CIG), or full-to-capacity as a consequence of CIG's tie-up (Northwest Pipeline), or not available because they stopped short of the Overthrust region. *Id.* Consequently, NGPL's actions harmed the market as well as CIG: suppliers and shippers that needed long-distance transportation were forced to use Trailblazer and were forced to pay "supracompetitive prices" (*id.* at 27a) that were then passed on to consumers. *Id.* at 40a-41a.

B. Proceedings Below

1. CIG filed this lawsuit in the United States District Court for the District of Wyoming, alleging that NGPL had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, had breached its contract, had breached its duty to perform on the contract in good faith, and had tortiously interfered with CIG's contract with Champlin. After an eight-week trial, the jury returned a verdict for CIG on all counts.

NGPL's motion for judgment NOV was denied. The district court found that substantial evidence supported the jury's verdict that NGPL had violated its contractual duty of good faith and fair dealing. *Id.* at 69a-73a. On the attempted monopolization claim, the district court ruled that (1) "[t]he jury could have concluded that competition actually diminished" (*id.* at 39a); (2) "a lower-priced competitor was excluded in

favor of a higher-priced competitor without a corresponding increase in allocative or productive efficiency" (*id.* at 40a); and (3) "CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas." *Id.* The district court also recognized that CIG had proven a dangerous probability of successful monopolization by showing that NGPL had in fact *succeeded* in exercising monopoly power:

> The weight of the evidence supports the jury's finding that *NGPL possessed the power to control prices and exclude competition.* That evidence showed NGPL's aggressive conduct, CIG's exclusion from the market, the market's vulnerability to increases in transportation prices and that *prices actually increased.* This constitutes sufficient evidence from which the jury could conclude that CIG proved a dangerous probability of success by a preponderance of the evidence.

Id. at 52a-53a (emphasis supplied).[5]

2. The court of appeals reversed on all but the tortious interference claim. Relying in part on an *amicus* brief submitted by FERC, the court held that FERC's general rulings on minimum bill provisions and its rulings specifically on the provisions in the Service Agreement preempted CIG's claim for simple breach of contract. *Id.* at 4a-9a.

The court of appeals also held preempted CIG's independent claim that NGPL breached its duty to perform in good faith. It based this preemption on an *inference* that

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[5] The jury found each of the four elements of attempted monopolization as defined in the Tenth Circuit: a relevant market, specific intent to monopolize, a dangerous probability of success, and conduct in furtherance of the attempt. App. 52a-53a. On one of these factors, a dangerous probability that the attempt would succeed, the jury was instructed that "a firm must possess market strength—market strength that approaches monopoly power; that is, the ability to control prices and exclude competition." Jury Instr. No. 33 (Doc. 574).

FERC would have intended to draw a line between "actions based upon tort" and "actions based upon contract," and to preempt all contract-based claims. *Id.* at 14a. The court of appeals acknowledged that it had no direct evidence of FERC's preemptive intent: FERC in its prior rulings "was not explicitly confronted" with this particular contract claim, *id.* at 11a, and FERC in its *amicus* brief "did not distinguish between the breach of contract damages awarded for bad faith failure to purchase gas and those awarded for failure to purchase gas under Section 2 of the Service Agreement." *Id.* at 12a.[6] Nevertheless, the court believed that it could infer the tort/contract distinction from FERC orders "in a closely analogous context," *id.*, and that inferred preemption was appropriate because FERC's orders "must have room to breathe." *Id.*

The court of appeals also reversed the jury's verdict of attempted monopolization. The court had no illusions about the reprehensible nature of NGPL's actions:

> Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation service to long distance customers. Because Natural reserved a certain amount of space in CIG's pipeline, CIG could not offer that space to others. By continuing to reserve large amounts of gas and taking gas when CIG threatened to sell Natural's capacity, Natural insured that CIG could not offer Natural's reserved capacity to the market.

Id. at 23a. The court recognized that this predatory conduct had enabled NGPL both to increase the Trailblazer System's market share to 54% *and* "to charge supra-competitive prices." *Id.* at 27a. Nevertheless, the court of appeals held this evidence insufficient to support a claim of attempted monopolization. Such a claim, the court

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[6] In fact, FERC in its *amicus* brief specifically declined "to take a position *vel non* on the propriety of the conduct in which the jury found Natural engaged." FERC Br. at 11.

held, requires a showing that defendant is likely to achieve a higher market share than 54%, typically "between 70% and 80%." *Id.* at 21a-23a & n.18. The court also rejected the claim because "the Trailblazer System's ability to charge supracompetitive prices" would likely last only six years, at which point "the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision to oust the entire body of state contract law simply because FERC orders have modified part of a contract is an extraordinary ruling that conflicts with several Fifth Circuit decisions and with controlling principles of preemption law established by this Court. These conflicts are particularly significant because of the substantial number of contracts periodically modified or affected by actions of regulatory agencies such as FERC. See App. 5a n.1.

The Tenth Circuit's antitrust ruling is more astonishing still. The panel expressly stated not only that NGPL excluded a lower-priced competitor from the market, but that it forced suppliers to pay "supracompetitive prices." The panel's willingness to tolerate admittedly "predatory conduct," whose demonstrated anticompetitive market effects will persist for at least six years, simply because the predator is unlikely to reach a target market share and would lose its ability to charge such prices within a finite period of time is unprecedented. The decision conflicts with at least two lines of court of appeals' decisions as well as with basic antitrust principles established by this Court, and it compounds the chronic disarray among the lower courts in addressing attempted monopolization claims under Section 2. Both the preemption and the antitrust issues are clearly presented by the opinion and facts below, and each independently merits review by this Court.

I.

1. The Tenth Circuit's preemption holding squarely conflicts with the Fifth Circuit's decision in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In *Gulf States*, the Fifth Circuit held that a utility's claim for "breach of an independent duty to act in good faith" was not preempted by the Federal Power Act or by the filed rate doctrine. *Id.* at 1469, 1474. Although the court acknowledged that "[t]he FPA also preempts *some* private causes of action for breach of contract" (*id.* at 1471, emphasis added), it explained that these would be cases in which recovery of damages would conflict with FERC's exclusive authority to set rates. *Id.* at 1471-72. In *Gulf States*, however, the claim was that "good faith negotiations would have reduced the *amount purchased* (not the rate)," and the court therefore ruled that "[t]his claim would not be preempted by the FPA." *Id.* at 1471 (emphasis in original). Indeed, the court noted that the FERC itself had refused to assert jurisdiction over this particular breach of contract claim. *Id.* at 1469, 1470-74 & n. 7.[7]

Like the claim in *Gulf States*, petitioner's claim is that NGPL's bad faith caused NGPL to reduce the amount of gas it purchased from petitioners. As in *Gulf States*, an award of damages for NGPL's bad faith would in no

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[7] Similarly, in *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417, 430 (5th Cir. 1987), the court of appeals affirmed FERC's ruling that its curtailment orders did not shield a seller from contract liability for its own fault in creating a need to curtail gas deliveries. In so ruling, the court reaffirmed a line of earlier Fifth Circuit decisions dating from 1973 that reached the same conclusion. *International Paper Co.* v. *FPC*, 476 F.2d 121, 125 (5th Cir. 1973) (vacating FPC opinion that suggested that compliance with an FPC-approved curtailment tariff would constitute "an absolute defense" to *all* damage actions based on breach of contract); *id.* at 131 (concurring opinion); *Louisiana* v. *FPC*, 503 F.2d 844, 865-69 (5th Cir. 1974) (following *International Paper*); cf. *Monsanto Co.* v. *FPC*, 463 F.2d 799, 808 (D.C. Cir. 1972).

way conflict with FERC's orders or with FERC's exclusive right to set rates under the filed rate doctrine. Damages for bad faith are calculated simply by determining the amount of gas NGPL would have purchased absent bad faith, at the filed rates for gas actually purchased (both F-1 and H-1), less expenses saved because of the breach.[8]

The Fifth Circuit's rulings highlight the basic error that underlies the Tenth Circuit's analysis: It is irrelevant to a determination of preemption in this context whether a state law claim is denominated as sounding in contract or in tort. What is dispositive is the *conduct* the state is regulating, not the "label" the state uses in regulating that conduct. *United Gas Pipeline Co.*, 824 F.2d at 429; accord *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 109 S.Ct. 2506, 2517 (1989); *Gulf States Utilities*, 824 F.2d at 1471; *United Gas Pipeline Co.*, 4 FERC ¶ 61,151 at 61,351 (Aug. 9, 1978) (App. 51b, 55b).[9] Furthermore, by "drawing a line" be-

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[8] The Tenth Circuit's concern, although never clearly expressed, apparently arises because CIG sought to calculate damages for gas not taken at both the F-1 and the H-1 rate. It is true that, in addressing the calculation of damages for a simple breach of the minimum purchase requirement, FERC limited CIG to recovery at the F-1 rate. But in so holding, FERC did not preclude CIG from seeking to be made whole for damages caused by NGPL's failure in bad faith to purchase gas. The proper damages remedy for such a breach (and the damages CIG sought) is simply to put CIG in the position it would have been had NGPL not refused to purchase gas in bad faith, and that in turn requires compensation at both the F-1 and H-1 rates, less variable costs and expenses saved because of the breach. Since both the F-1 and the H-1 rates are part of a FERC-approved tariff, using them to calculate damages in no way "interferes" with FERC's exclusive jurisdiction to set rates.

[9] The Tenth Circuit simply misread the Fifth Circuit's decision in *United Gas Pipe Line Co.* as holding that "FERC orders prohibiting suits based upon breach of contract . . . also forbid suits based upon breach of the contractual obligation of good faith and fair dealing." App. 13a-14a n.11. Read in context it is clear that the Fifth Circuit preempted only those "good faith" claims

tween contract and tort, the panel's decision stands as a precedent for preempting not only claims of bad-faith breach but the whole panoply of contractual claims and defenses. Compare, *e.g.*, *Gulf States Utilities*, 824 F.2d at 1472 (refusing to preempt contractual defense of frustration). Because such claims and defenses regularly arise in litigation over contracts approved by FERC, and because the state law preempted here is traditionally of special concern to the states,[10] the panel's tort-contract distinction constitutes a fundamental error of broad significance that this Court should correct.[11]

2. The Tenth Circuit's decision also conflicts with basic preemption principles established by this Court. Although the Court has been willing in the past to infer preemption where *Congress* has not expressly stated its intent to preempt,[12] the Court has repeatedly refused to find that *agency* action has preempted state law absent either a clearly stated administrative intent to preempt or

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that, despite their name, were founded in substance on a simple breach of contract rather than on affirmative misconduct. 824 F.2d at 429. In fact, United itself conceded that it would be liable for damages "when a customer proves United's bad faith or willful misconduct." 824 F.2d at 426.

[10] *E.g.*, *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663 (1961); *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

[11] This Court recognized but declined to reach the question whether preemption of a simple breach of contract claim would also require preemption of a contract claim based on "affirmative misconduct" in *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 583-84 & n.13 (1981) ("*Arkla*"). The Court's decision to leave this question open in *Arkla* is particularly significant because the problem left open in *Arkla* is harder than the issue presented here: In *Arkla*, unlike this case (see note 8, *supra*), damages for defendant's misconduct would necessarily have been calculated at a rate never filed with FERC.

[12] *E.g. Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 143 (1982).

an actual conflict between agency requirements and state law. In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), the Court explained its reluctance to infer preemptive intent from circumstantial evidence such as the comprehensiveness of agency actions:

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. . . .
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> Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt.

Id. at 717-18.[13]

In this case, the court of appeals did not "pause"; it leapt to the conclusion that preemption could be inferred. It did so despite its own acknowledgment that FERC had never addressed the issue either in its orders or even through an *amicus* brief, and it refused to solicit FERC's views on this issue despite petitioner's express request in seeking rehearing that the court do so.[14] The Tenth Cir-

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[13] See also *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 583-84 (1987) (no preemption where regulations were "devoid of any expression of intent to preempt state law"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 705 n.10 (1984) (preemption upheld because agency's "preemptive intent could not be more explicit or unambiguous" and state law "plainly conflicts"); *Fidelity Federal Sav. & Loan Ass'n.* v. *De la Cuesta*, 458 U.S. 141, 154-59 (1982) (preemption upheld because agency's preemptive intent "is unambiguous").

[14] Compare *Distrigas of Massachusetts Corp.* v. *Boston Gas Co.*, 693 F.2d 1113, 1118-19 (1st Cir. 1982) (FERC's intent "can be

cuit believed that it was free to infer FERC's views by reasoning from FERC decisions "in a closely analogous context." App. 13a. In so doing, the court erred not only in inferring preemption from agency silence, but in erroneously interpreting what FERC has previously held. Both the decision on which the panel chiefly relied,[15] as well as numerous decisions that the panel did not cite,[16]

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answered fully and quickly through amicus participation" by FERC).

[15] See *Transcontinental Gas Pipe Line*, 35 FERC (CCH) ¶ 61,043 at 61,080 (April 7, 1986) (App. 30b, 43b) ("[A] pipeline's adherence to effective curtailment tariffs would be a defense to pure contract damage claims, but . . . the pipeline could nevertheless be liable for damages flowing from its role in creating the situation that resulted in curtailments"); *id.* at 45b-46b (same); *id.* at 49b (same); see also *Transcontinental Gas Pipeline Corp.*, 35 FERC (CCH) ¶ 61,340 at 61,783 (June 16, 1987) (App. 23b, 28b) (on rehearing) ("As indicated in Opinion No. 248, *recovery of damages for breach of contract* (or other contract-based cause of action, such as promissory estoppel) arising out of curtailment *will be prevented* by a pipeline's adherence to an approved curtailment plan in administering curtailments, *unless there is a showing of negligence or misfeasance* in causing the shortages that result in having to resort to use of the curtailment plan") (emphasis added, footnotes omitted). Although the Commission in *Transcontinental Gas* did not explicitly state that "bad faith performance" is to be deemed a subset of "misfeasance," it has taken precisely this position in a host of other analogous decisions. See note 16, *infra*.

[16] See, *e.g.*, *Southern Company Services, Inc.*, 37 FERC (CCH) ¶ 61,256 at 61,652 (Dec. 15, 1986) (App. 1b, 14b) (refusing to accept jurisdiction over contractual claim for breach of good faith duty and explaining that such a claim "is not one which appears to implicate technical expertise, nor is it one which is central to our regulatory responsibilities"); *United Gas Pipe Line Co.*, 4 FERC (CCH) ¶ 61,151 at 61,351 (Aug. 9, 1978) (App. 51b, 55b-56b) ("in cases involving negligence, *bad faith* or wrongful conduct on the part of a pipeline, *the Commission has no power to adjudicate contract liability*, and that such liability must be determined by the courts") (emphasis added); *United Gas Pipe Line Co.*, 49 FERC (CCH) ¶ 61,096 at 61,443 & nn.71-72 (Oct. 27, 1989) (curtailment order limits breach of contract liability only in "the absence of negligence, *bad faith*, fault or willful misconduct") (emphasis

establish conclusively that FERC has never drawn a tort/contract distinction and has repeatedly held that its orders modifying contracts do not preempt contract claims for breach of a good faith duty or other affirmative misconduct. This case thus well-illustrates the danger of basing preemption solely on an *inference* of agency intent.

3. Finally, the case merits review because the Tenth Circuit's holding that agency orders must be given "room to breathe" is fundamentally misguided and pernicious. App. 12a. Finding a need for breathing room is no substitute for finding an actual conflict.[17] The Tenth Circuit neither found an actual conflict, nor could it reasonably have done so: The fact that FERC limited recovery for simple breach of contract to calculations at the F-1 rate has no bearing on the separate state law claim for bad faith performance; all that matters is that dam-

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added); *United Gas Pipe Line Co.*, 35 FERC (CCH) ¶ 61,344 at 61,791-61,792 (June 17, 1986) (same); *United Gas Pipe Line Co.*, 31 FERC (CCH) ¶ 61,336 at 61,768 (same); *United Gas Pipe Line Co.*, 49 FPC 1211, 1221 (1973) (same).

[17] *E.g.*, *California Coastal Comm'n*, 480 U.S. at 594. The cases on which the Tenth Circuit relied for its breathing room theory (App. 10a-12a) are inapposite because each involved either a direct conflict between agency action and state law or a state agency or court addressing a question expressly decided by an agency. See *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579-84 & n.13 (1981) (preempting "simple breach" of contract because FERC had directly ruled on it and because such damages would amount to a "retroactive rate increase[]" that Congress intended to preempt); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 973 (1986) (preempting state power commission's allocation order because it "conflict[ed] with FERC's orders"); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324, 326-330 (1981) (preempting state law because it was "inconsistent" with regulatory scheme and because agency had expressly declined to provide the requested relief); *see also Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465, 1470-71 (5th Cir. 1987) (*Arkla* and *Nantahala* do not require preemption of contract claim for breach of good-faith duty).

ages for the latter claim are calculated, as they were here, according to FERC-approved rates.[18]

Far from protecting the integrity of FERC orders, the Tenth Circuit's rule undermines it by giving parties whose contracts are modified by agency actions a license to engage in affirmative misconduct without fear of common law sanctions. FERC's specific purpose here—to encourage competition by reducing the economic disincentive of buyers to switch to lower-priced gas and thus reduce consumer's costs—was defeated by respondent's decision to switch to *higher* priced gas in order to tie up a competitor's pipeline and divert gas onto a higher-priced pipeline system, thereby raising costs to suppliers and consumers. Holding a pipeline liable under state contract law for such misconduct would further FERC's primary regulatory goals of protecting consumers, decreasing regulatory oversight, and fostering competition.[19]

II.

The Tenth Circuit's antitrust ruling is equally worthy of this Court's review. The panel's ruling places the

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[18] See note 8, *supra*. On rehearing, respondents did not attempt to defend the panel's tort-contract distinction, but did argue that petitioner had effectively waived this claim by having urged the courts below to calculate damages solely at the H-1 rate (minus variable costs). Respondents' waiver theory was not adopted by the Tenth Circuit, and therefore cannot serve to limit the controlling impact of the decision below on subsequent cases. Moreover, the assertion is absolutely wrong. Petitioner has always sought to calculate the damages for gas that NGPL would have purchased absent NGPL's bad faith at the full commodity rate, which includes both the H-1 and F-1 schedule. The jury was instructed to calculate damages as "the profit that Colorado Interstate would have made if Natural had fully performed, together with any incidental damages, but less expenses saved because of the breach." Jury Instr. No. 45 (Doc. 574).

[19] See, *e.g.*, Order No. 380, *supra*; *Tennessee Gas Pipeline Company* v. *Pan Canadian Petroleum Co.*, 38 FERC (CCH) ¶ 61,236 at 61,749 (Mar. 10, 1987) ("the NGPA mandates less regulatory intrusion into private contractual arrangements. Consideration by the courts . . . [of] breach of contract suits by producers is consistent with the Commission's role and regulatory policies under the NGPA").

Tenth Circuit in conflict with other courts of appeals, exacerbates longstanding confusion over the legal standard for attempted monopolization, and fundamentally misconceives Section 2 and the role of economic analysis in antitrust law.

1. The Tenth Circuit's antitrust analysis and holding conflicts with the Fifth Circuit's decision in *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). In *Associated Radio*, the court of appeals affirmed a jury verdict of liability under Section 2 in a case where defendant, through a series of exclusionary acts, had expanded its market share to 50% while at the same time it had raised prices. 624 F.2d at 1352-57 & nn.18, 22, 25. The court of appeals expressly considered and rejected the same two arguments that the Tenth Circuit found controlling. It acknowledged that a 50% market share was lower than the share "in some cases that find actual monopolization," but found such a share sufficient when "viewed alongside the evidence of the number of actual competitors, the high barriers to entry, . . . and [defendant's] power over price." *Id.* at 1357. In addition, the court expressly rejected the argument that defendant's exclusionary conduct amounted to a mere business tort because it found that the conduct caused "significant and more-than-temporary harmful effects on *competition*, shown in part by the rise in prices charged to customers." *Id.* at 1354 (citing III P. Areeda and D. Turner, *Antitrust Law*, ¶ 737b at 278 (emphasis in original)). The Fifth Circuit concluded that proof of exclusionary conduct that allows a defendant to increase market share to 50% and to raise prices is sufficient to support a jury verdict of either attempted monopolization or monopolization under Section 2. *Id.* at 1357-58 n.25.

This case conflicts directly with *Associated Radio*, because the Tenth Circuit concluded that the same crucial facts that constituted a violation of Section 2 in *Associated Radio*—predatory conduct, market share of 50%, ability

to charge supracompetitive prices for several years—amounted to a mere business tort here. Had this case been brought in the Fifth Circuit, petitioner would have prevailed.

Petitioner recognizes, as did the court in *Associated Radio*, that it is important to distinguish between exclusionary conduct that amounts to a mere business tort and exclusionary conduct that violates Section 2. But the line that the Tenth Circuit drew between those two cannot be the correct one. As the Fifth Circuit understood, exclusionary conduct that harms only a competitor may properly be deemed merely a business tort; exclusionary conduct that also has anticompetitive effects on the market—increased prices due not to increases in efficiency or quality but to the exclusion of a lower-cost competitor—violates Section 2. 624 F.2d at 1352-57; cf. *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1416-17 (7th Cir. 1989) (rejecting attempted monopolization claim where ability of defendant ever to charge "supracompetitive prices" was at best "a risky assumption"). The conflict posed here thus goes to the heart of Section 2, and therefore merits review by this Court.

2. The Tenth Circuit's holding that proof of a likely achievement of a high market share is an essential element of an attempted monopolization claim also conflicts with the standard for attempted monopolization employed by the Ninth and Eighth Circuits, as well as with the reasoning employed by other courts. The Ninth Circuit has long endorsed the rule that "an attempted monopoly violation can be found with evidence of conduct alone," *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.) *cert. denied*, 459 U.S. 1009 (1982), and has employed "a flexible approach toward the 'mix' of conduct, actor, and market conditions" in evaluating attempted monopolization claims. *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). This approach was

recently endorsed by the Eighth Circuit. *H.J., Inc.* v. *ITT*, 867 F.2d 1531, 1543 (8th Cir. 1989) (following *Twin City*). Moreover, while not adopting the Ninth Circuit's approach, the Second Circuit has stated that proof of market share is not "invariably a requirement of a monopolization claim," and is unnecessary where there is "unambiguous evidence that the defendant has power to control prices or exclude competition." *Broadway Delivery Corp.* v. *United Parcel Serv.*, 651 F.2d 122, 130 (2d Cir.), *cert denied*, 454 U.S. 968 (1981).

Under the standards employed in these circuits, the jury verdict in this case would necessarily be affirmed. The record here not only demonstrates the kind of exclusionary conduct that "inevitably harms competition," *Hunt-Wesson*, 627 F.2d at 925, but also supports a finding that NGPL had the "power to control prices" and did in fact control them. *Broadway Delivery*, 651 F.2d at 130.

3. The Court should address these circuit conflicts. The conduct proven in this case is undoubtedly sufficient to make out a violation of Section 2 in some circuits but not in the Tenth, and the conflict in the lower courts is both persistent and substantial.[20] The last attempted monopolization case decided by this Court was *Lorain Journal* v. *United States*, 342 U.S. 143 (1951), where the Court affirmed a judgment of attempted monopolization without inquiring whether the evidence would support a dangerous probability of success or would show a likelihood of achieving a high market share. Other Section 2 decisions raise, at the very least, a serious question whether this Court would conclude that proof of a high market share is invariably a prerequisite for section 2 liability. *E.g.*, *Walker*

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[20] See generally Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success,"* 61 Notre Dame L. Rev. 1109, 1110, 1112, 1144 (1986) ("few areas of antitrust law have produced wider disagreement among courts and commentators than the proscription against attempts to monopolize contained in Section 2 of the Sherman Act").

Process Equip., Inc. v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) (reversing the dismissal of a complaint alleging attempted monopolization to allow consideration whether anticompetitive conduct may constitute a "per se" violation of Section 2); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948) ("It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market'"); cf. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03, 608-11 (1985) (exclusionary conduct without efficiency justification is "predatory"). See generally III P. Areeda & D. Turner, *Antitrust Law* ¶ 836 (1978) (describing types of conduct sufficient to prove violation of Section 2 without any showing of market power).

4. Review is also appropriate because the Tenth Circuit has decided questions of substantial importance to federal antitrust enforcement in ways that conflict with the positions of the Department of Justice. The panel held that predatory conduct with demonstrated anticompetitive market effects (raising prices to supracompetitive levels) is not actionable under the antitrust laws unless the predator can sustain such pricing over some indefinite period longer than six years. App. 25a-28a & n.23. This unprecedented holding is flatly inconsistent with the Department's Merger Guidelines, which state that the Department will challenge a merger that allows a price increase for two years or longer, 49 Fed. Reg. 26,823, 26,832 (1984). A realistic hypothetical illustrates the Tenth Circuit's error: If an American industry were completely protected from foreign competition by a tariff that was due to expire in six years, no court would hold that the temporal limitation excused a merger of the American firms to achieve supracompetitive profits for those six years.

Similarly, the Department of Justice's standard for proving attempted monopolization is that proof of unambiguously anticompetitive conduct alone is sufficient:

> [T]he 'dangerous probability' test can be met by showing *either* that the attempt would succeed in establishing a monopoly *or* that the defendants had engaged in truly abusive or predatory conduct that has no independent economic justification. The Department has previously taken the position that conduct which is predatory or clearly without economic justification should be held to violate Section 2, and some lower appellate courts have indicated a willingness to infer 'dangerous probability' from the exclusionary nature of the conduct itself.

Tire Company Cases—U.S. Information Memorandum, 1976 Trade Reg. Rep. (CCH) ¶ 50,259 at 55,502 (Feb. 23, 1976) (emphasis added). Had the Tenth Circuit applied the Department's standard, it would have affirmed the jury verdict.

5. Perhaps the most fundamental reason for granting certiorari, however, is that the court of appeals' antitrust ruling rests on analytic errors that must be corrected if Section 2 is to be properly understood and enforced. The panel erred not only in holding that six years of supracompetitive pricing caused by predatory conduct was insufficient to support a Section 2 verdict, but in confusing a mere indicator of monopoly power (market share) with monopoly power itself. This Court has defined monopoly power as "the power to control prices or exclude competition." *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The district court found, and the court of appeals confirmed, that respondent excluded a low-cost competitor from competing in the market and expanded Trailblazer's market share while forcing customers (producers) to pay supracompetitive prices. App. 27a, 40a-41a. This, plainly and simply, *is* the exercise of monopoly power. *E.g.*, *Associated Radio*, 624 F.2d at 1352-57; *Broadway Delivery*, 651 F.2d at 130.

The court of appeals missed this point because it believed, erroneously, that a necessary condition for the exercise of monopoly power is the achievement of a very

high market share (*e.g.*, 70% to 80%). As many courts and commentators have recognized, however, "the size of a regulated company's market share should constitute, at most, a point of departure in assessing the existence of monopoly power. Ultimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition." *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). See *e.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948) ("The relative effect of percentage command of a market varies with the setting in which that factor is placed"); *Broadway Delivery*, 651 F.2d at 128 ("As the cases and commentators have cautioned, . . . the true significance of market share data can be determined only after careful analysis of the particular market"); L. Sullivan, *Antitrust* 38 (1977) (focusing solely on market share becomes a serious mistake when it "get[s] in the way" of "a more direct concern with [monopoly] power"). Accordingly, the Second and Fifth Circuits have held that a 50% share or less is sufficient to sustain a verdict of monopolization,[21] and other courts have held that attempted monopolization may be found with market shares less than 50%.[22]

If the court of appeals had properly focused its attention on the fundamental question under Section 2—whether defendant attempted to achieve or exercise the power to exclude competition and control prices—it would

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[21] See *Hayden Publishing Co.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984) ("a party may have monopoly power . . . even though its market share is less than 50%"); *Broadway Delivery Corp.*, 651 F.2d at 130 (same); *Associated Radio*, 624 F.2d at 1352 & n.18.

[22] *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1301, 1309 (9th Cir.) (24%), *cert. denied*, 459 U.S. 1009 (1982); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598-99 (7th Cir. 1971) (33%), *cert. denied*, 405 U.S. 1066 (1972).

have concluded that under its own stated view of the case the jury's verdict required affirmance. The market share figures on which the panel focused are not simply an indicator of potential monopoly power, but a *measure of the extent to which NGPL succeeded in garnering monopoly power.*[23] The Tenth Circuit expressly recognized that NGPL, by its "tie up of CIG's pipeline capacity," succeeded in "shift[ing] 13% of the market to the Trailblazer System" and forcing customers to pay "supracompetitive prices." App. 23a, 27a. This is nothing less than a demonstration of both attainment and exercise of monopoly power. Moreover, the 54% share attributed to Trailblazer here understates Trailblazer's actual power, because NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas." *Id.* at 39a. As the only pipeline with available capacity, Trailblazer effectively had 100% of the market for new transportation services, and was free to impose its supracompetitive prices on suppliers and shippers. See generally, Fisher, *Diagnosing Monopoly*, 8 Q. Rev. Econ. & Bus. 7 (1979).

This Section 2 case therefore presents this Court with the same problem posed by the court of appeals' analysis of Section 1 in *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986). In that case, the FTC's order had been set aside for failing adequately to define the relevant market and to show that defendants actually had sufficient market power to restrain competition. This Court held, however, that proof of actual adverse effects on competition obviated the need for precise market definition or a showing of market power:

> Since the purpose of the inquiries into market definition and market power is to determine whether an

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[23] *E.g.*, Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 974 (1981) ("if a buyer complains that his seller violated Section 2 of the Sherman Act by monopolizing, he is alleging implicitly that the seller did something to increase his market share").

> arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' . . . In this case, we conclude that the finding of actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

476 U.S. at 460-61. By focusing only on proof relating to one of the indicators of monopoly power while ignoring the proof "of actual, sustained adverse effects on competition," the Tenth Circuit committed the same error as did the Seventh Circuit in *Indiana Federation of Dentists*. This fundamental principle underlying Section 1 should be held equally applicable to Section 2. See *Broadway Delivery*, 651 F.2d at 130 ("We do not suggest that evidence of market share is invariably a requirement of a monopolization claim . . . [because it is sufficient to] produce unambiguous evidence that the defendant has the power to control prices or exclude competition").

Indeed, the Tenth Circuit's error in this case is even more stark than was the error in *Indiana Federation of Dentists*. In this case petitioner not only proved anticompetitive effects but also provided "an elaborate market analysis" (476 U.S. at 461) that explained why respondent was able to achieve and exercise such power. The market for long-distance transportation of Wyoming natural gas is precisely the type of concentrated market with high entry barriers that makes it possible for a dominant firm with over 50 percent of the market to exercise monopoly power.[24] Elasticity of demand was low

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[24] See *Maryland People's Counsel* v. *FERC*, 761 F.2d 780, 784-85 (D.C. Cir. 1985) (discussing "monopoly power of pipelines"); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 959 (1981) ("When the elasticities of demand and supply are both high, a market share well above 50% is necessary to

because, for producers of natural gas in Wyoming, there were no close substitutes for pipeline transportation as a means of getting their product to the marketplace. In addition, barriers to entry in the form of a new pipeline were quite high (or, put another way, supply was inelastic). This case thus illustrates clearly why a proper market analysis requires consideration of factors other than market share.

* * * *

Commentators may debate the merits of deregulating the natural gas industry, but no one has proposed that courts pursue deregulation by exempting pipelines from the antitrust laws or traditional state common law. The court of appeals' holdings on both preemption and antitrust flatly conflict with numerous decisions of the court of appeals and of this Court. These conflicts are substantial and persistent, and the underlying issues are national in scope. Accordingly, this Court should grant the petition.

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confer appreciable market power. *When either demand or supply elasticity is low, a smaller market share confers the same power*"). As the ABA Antitrust Law Task Force recently explained, "the [Antitrust] Division should investigate possible Section 2 Sherman Act cases: . . . [in] industries where market imperfections may have resulted from the structure of the industry or from governmental regulation." *Report of the ABA Antitrust Law Task Force on the Antitrust Division*, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1425 at S-4 (July 19, 1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 1990

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